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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

IN THE MATTER OF

NORCOM COMMUNICATIONS CORPORATION  
ASS'N FOR EAST END LAND MOBILE COVERAGE  
LMR 900 ASSOCIATION OF SUFFOLK  
NY LMR ASSOCIATION

WTB DOCKET No. 98-181

TO: HON. ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

JOINT MOTION FOR SUMMARY DECISION

Norcom Communications Corporation ("Norcom") and the Association for East End Land Mobile Coverage ("East End"), the LMR 900 Association of Suffolk ("LMR 900"), and the NY LMR Association ("NY LMR") (collectively the "Associations") (the Associations together with Norcom, the "Movants"), by their attorneys and pursuant to section 1.251 of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission"), 47 C.F.R. § 1.251 (1998), hereby move the Presiding Judge to grant summary decision, in the manner set forth below, of the issues designated in the above-captioned proceeding, dismiss without prejudice certain applications filed by Norcom, assess Norcom and the Associations with the monetary forfeitures and other sanctions set forth below, and terminate this proceeding.<sup>1</sup> As set forth more fully below, grant of this motion ("Motion") is warranted.

I. Background and Statement of Facts

Background

In this proceeding, the Commission seeks to determine whether to revoke certain Commission licenses held by Norcom and the Commission licenses held by the Associations, to determine whether to deny certain applications filed by Norcom, and to determine whether to impose forfeitures on Norcom and the Associations.

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<sup>1</sup> The Movants understand that the Commission's Wireless Telecommunications Bureau ("WTB") will file comments supporting the Motion within fourteen (14) days of the date that the Motion is submitted.

On October 14, 1998, the Commission released an *Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture* ("HDO"). The HDO designated the following issues for hearing:

(a) to determine whether Norcom, East End, LMR 900, ... and/or ... [NY LMR]<sup>2</sup> violated Section 310(d) of the [Communications] Act [of 1934] by engaging in unauthorized transfers of control of Stations WPAT918, WNXT323, WPAZ643, WPAP734, and/or WPAT910;

(b) to determine whether Norcom, East End, LMR 900, ... and/or ... [NY LMR] violated Section 90.179(f) of the Commission's Rules, 47 C.F.R. § 90.179(f), by operating Stations WPAT918, WNXT323, WPAZ643, WPAP734, and/or WPAT910 on a for-profit basis;

(c) to determine whether Norcom has abused the Commission's processes in connection with the creation and/or control of the Associations and/or with the control and/or operation of the Associations' stations;

(d) to determine, in light of the evidence adduced pursuant to the foregoing issues, whether Norcom, East End, LMR 900, ... and/or ... [NY LMR] are basically qualified to be Commission licensees;

(e) to determine, in light of the evidence adduced pursuant to issues (a)-(d), whether the above-captioned licenses should be revoked; and

(f) to determine, in light of the evidence adduced pursuant to issues (a)-(d), whether the above-captioned applications should be granted.

The HDO also proposed the imposition of a maximum forfeiture of \$185,000 for Norcom and \$37,000 for each Association.<sup>3</sup>

In the HDO, the Commission alleges that Norcom played a substantial role in organizing the Associations and causing the Associations to seek the use of spectrum that could not be used for commercial operations;<sup>4</sup> that the management agreements under which Norcom managed the radio facilities of the Associations gave Norcom unacceptable control over the construction, daily operation, maintenance, management, and marketing of the Associations' stations

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<sup>2</sup> The HDO designated for hearing the same issues against Metro NY LMR Association and Wireless Communications Association Of Suffolk County, both of which have surrendered their licenses for cancellation and withdrawn from this proceeding. See *Memorandum Opinion and Order*, FCC 99M-21, released March 19, 1999.

<sup>3</sup> HDO, ¶ 14.

<sup>4</sup> HDO, ¶ 11.

and the personnel who performed these functions and substantial financial control over the Associations;<sup>5</sup> and that the Associations' stations were used to provide commercial service, in violation of the limitations on the use of the Associations' licenses.<sup>6</sup> Based on these allegations, the Commission asserts that there are substantial and material questions as to whether Norcom and the Associations have engaged in unauthorized transfers of control of the Associations' stations in violation of Section 310(d) of the Communications Act of 1934 ("Act").<sup>7</sup> In addition, the Commission alleges there are substantial and material questions as to whether Norcom and the Associations used the stations licensed to the Associations to provide for-profit private carrier service in violation of Section 90.179(f) of the Commission's Rules.<sup>8</sup> The Commission further alleges there are substantial and material questions as to whether Norcom abused the Commission's processes by, as the Commission alleges, setting up and controlling the Associations for the purpose of acquiring licenses it was not eligible to acquire in its own name.<sup>9</sup>

Subsequent to the issuance of the HDO, the Movants and the FCC's Wireless Telecommunications Bureau ("WTB") conducted discovery. In addition, Robert Nopper, former principal of Norcom, Douglas Nopper, current principal of Norcom, and George Petrutsas, counsel to the Associations when they were organized and obtained their FCC licenses, have provided sworn declarations reciting facts relevant and material to the issues in the proceeding. In light of facts brought to the Commission's attention since the HDO's release, the WTB and counsel for the Movants have engaged in extensive settlement discussions. On July 22, 1999, the Movants and the WTB entered into a Settlement Agreement ("Agreement"), which is being filed contemporaneously herewith as an attachment to the parties' Joint Request for Approval and Adoption of the Settlement Agreement.<sup>10</sup> If the Presiding Judge grants this Motion and the Joint Request for Approval and Adoption of the Settlement Agreement, Norcom would pay a forfeiture of

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<sup>5</sup> HDO, ¶ 9.

<sup>6</sup> HDO, ¶ 10.

<sup>7</sup> HDO, ¶ 9.

<sup>8</sup> HDO, ¶ 10.

<sup>9</sup> HDO, ¶ 12.

<sup>10</sup> A copy of the Joint Request for Approval and Adoption of the Settlement Agreement is attached hereto as Exhibit F.

\$110,000,<sup>11</sup> institute a compliance program, and refrain from managing, holding or applying for a license for any FB7 station.<sup>12</sup> The Associations would each surrender their licenses for cancellation, pay a forfeiture of \$3,000, and refrain from holding or applying for a license for any FB7 station.

The facts presented herein and the documents appended hereto support findings by the Presiding Judge that (a) under the criteria prescribed by the Commission in paragraphs 8 and 9 of the HDO, Norcom and the Associations violated Section 310(d) of the Act and Section 90.179(f) of the Commission's Rules, (b) Norcom did not abuse the Commission's processes, (c) Norcom is basically qualified to be a Commission licensee,<sup>13</sup> and (d) Norcom's licenses should not be revoked.<sup>14</sup> The Presiding Judge is requested to impose upon Norcom and the Associations the sanctions specified herein as reasonable punishments for the violations which the facts support.

### Statement of Facts

This Motion is supported by the Declarations of George Petrutsas, Robert Nopper, and Douglas Nopper (Exhibits A-C hereto, respectively), the Request of the Associations to the WTB for Admission of the Genuineness of Documents and Admission of Facts (Exhibit D hereto), and the WTB's Response thereto (Exhibit E hereto).

Norcom, located in Bayshore, New York, has been in the land mobile wireless business for many years.<sup>15</sup> It currently holds, among others, five Commission authorizations for 800 MHZ Specialized Mobile Radio ("SMR") stations.<sup>16</sup> Pursuant to the authorizations, Norcom provides SMR and other communications services to customers on a "for-profit" basis.<sup>17</sup> In addition, Norcom manages land mobile communications systems that are licensed to other entities.<sup>18</sup>

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<sup>11</sup> Thus, the Agreement provides for a harsh monetary penalty for Norcom and sends a strong message that unauthorized transfers of control will not be tolerated.

<sup>12</sup> FB7 stations are Private Mobile Radio Service stations authorized to operate on a non-profit, cost-shared basis pursuant to 47 C.F.R. § 90.179(f).

<sup>13</sup> Pursuant to the Agreement, the Associations have agreed to return their licenses for cancellation and not apply for or hold further FB7 licenses.

<sup>14</sup> Id.

<sup>15</sup> Exhibit B at ¶ 1.

<sup>16</sup> The stations are designated by the call signs WZA770, WNBW505, WNAJ380, WNRU218 and WNJU965.

<sup>17</sup> Exhibit C at ¶ 2.

<sup>18</sup> Exhibit C at ¶ 2.

In 1990 and 1991, Norcom and its then principal, Robert Nopper, relying on the advice of Norcom's communications counsel, assisted in the formation of seven non-profit associations.<sup>19</sup> The associations were formed in an attempt to assist small businesses meet their communications requirements.<sup>20</sup> While SMR systems, such as those operated by Norcom, were able to meet some of those needs, Mr. Nopper and other individuals involved in various aspects of the land mobile wireless industry in the Long Island, New York area sought to foster the development of alternative two-way radio systems in the area.<sup>21</sup>

Five of the associations, with the assistance of Norcom and its counsel, obtained Commission licenses for FB7 stations on frequencies above 800 MHz.<sup>22</sup> Three of the associations, East End, LMR 900, and NY LMR, remain parties in this proceeding.<sup>23</sup>

During the license application process, the Associations provided information to the FCC regarding Norcom's proposed role as manager of the Associations' stations.<sup>24</sup> For example, in response to a letter from the FCC, dated April 10, 1991, returning East End's application, East End advised the FCC that "the control point and mailing address is that of Norcom Communications Corporation. It is anticipated that Norcom will provide facilities for and will operate the control point of this association as a contractor. Norcom also helped organize this association."<sup>25</sup> In addition, the FCC was aware that Norcom would manage the two-way radio facilities licensed to the other Associations.<sup>26</sup> Thus, the fact that Norcom was involved in the Associations' efforts to operate a two-way radio system was made known to the FCC's staff during the licensing process.

The seven associations were represented by communications counsel who helped them prepare and submit their applications to the Commission.<sup>27</sup> During the processing of the

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<sup>19</sup> Exhibit A at ¶¶ 3-5; Exhibit B at ¶¶ 4-5.

<sup>20</sup> Exhibit B at ¶¶ 3-5.

<sup>21</sup> Exhibit A at ¶ 3; Exhibit B at ¶¶ 3-5.

<sup>22</sup> Exhibit B at ¶ 6.

<sup>23</sup> See Memorandum Opinion and Order, FCC 99M-21, released March 19, 1999.

<sup>24</sup> Exhibit A at ¶¶ 5-7; Exhibit B at ¶ 7.

<sup>25</sup> Exhibit B to Norcom's Motion to Delete And/Or Change Issues, filed December 9, 1998, attached hereto as Exhibit G; Exhibit A at ¶ 6 and Attachments 3, 4.

<sup>26</sup> Exhibit B at ¶ 4; Exhibit A at ¶¶ 6-7.

<sup>27</sup> Exhibit A at ¶ 6 and Attachments 3, 9, 11.

applications, the Associations' counsel discussed with the FCC's staff the nature of the applicants, the proposed plan to provide service to eligible entities on a shared-cost basis, and the proposed system management role of Norcom in response to staff inquiries.<sup>28</sup> The Commission's staff raised no further issues regarding these matters during the processing of the applications.<sup>29</sup> The FCC staff, however, continued to have concerns relating to the total number of frequencies requested by the seven associations.<sup>30</sup> Accordingly, the FCC staff and the associations agreed upon an arrangement whereby two of the associations withdrew their applications and the applications of four of the five remaining associations were granted with the condition that the authorized systems would be "loaded" during a period shorter than that prescribed by the Commission's rules (the "1992 Settlement Agreement").<sup>31</sup>

The five associations' stations were subsequently constructed and managed on behalf of the associations by Norcom pursuant to written management agreements.<sup>32</sup> Such arrangements were common at the time for the management and operation of SMR as well as private land mobile radio systems and the management agreements between Norcom and the associations were typical of those used in the industry.<sup>33</sup> Briefly, each management agreement provided that, Norcom would construct, maintain, service, operate and market the station under the overall supervision of the association licensee involved.<sup>34</sup> The management agreements also provided that the licensee associations would retain the overall power and responsibility for the proper operation of their respective stations and for compliance with the Commission's licensing requirements.<sup>35</sup>

Numerous small businesses on Long Island eligible under the Commission rules to utilize the stations licensed to the five associations began doing so to meet their communications needs.<sup>36</sup>

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<sup>28</sup> Exhibit A at ¶¶ 6-7 and Attachments 2, 3, 4, 7, 9.

<sup>29</sup> Exhibit A at ¶¶ 6-7.

<sup>30</sup> Exhibit A at ¶ 6.

<sup>31</sup> Exhibit A at ¶ 7 and Attachments 12, 13, 14, 15.

<sup>32</sup> Exhibit B at ¶ 6.

<sup>33</sup> Exhibit A at ¶ 4.

<sup>34</sup> Exhibit A at ¶¶ 4, 8 and Attachment 16.

<sup>35</sup> Exhibit A at ¶ 4 and Attachment 16.

<sup>36</sup> Exhibit C at ¶¶ 2, 5.

They receive two-way radio service from the associations' stations at costs that are typically one-half that of industry competitors, including the rates charged by Norcom in its SMR business.<sup>37</sup> In 1996, after receiving an informal complaint from one of Norcom's competitors about these low rates, the Commission initiated an investigation of Norcom's and the Associations' compliance with the Commission's rules.<sup>38</sup>

On July 31, 1997, the FCC granted an application proposing to transfer control of Norcom from Robert Nopper to Douglas Nopper.<sup>39</sup> The application was the result of Robert Nopper's desire (i) to exit the two-way radio business after over twenty years and pass-on the family business to his son, Douglas Nopper, and (ii) concentrate on his public safety duties as a Emergency Medical Services instructor, certified N.Y. state arson investigator, member of a local Fire District, and communications consultant to various public safety entities in the New York metropolitan area.<sup>40</sup> Douglas Nopper, who was twenty-four at the time of the transfer, had been a college student in Albany, New York, during the time period in which the associations were formed and granted FCC licenses.<sup>41</sup> Douglas Nopper had no role in the formation of the associations, or their efforts to secure FCC licenses.<sup>42</sup> Today, Douglas Nopper is the President and sole shareholder of Norcom and manages that company's two-way radio business.<sup>43</sup>

## II. Discussion

Section 1.251 of the Commission's Rules, 47 C.F.R. § 1.251 (1998), provides for summary decision when there is no genuine issue of material fact for determination at hearing. The moving party bears the burden of demonstrating that "the basic facts are undisputed and the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts." *Ellis Thompson Corp.*, 10 FCC Rcd 12554 ¶ 62 (1995), citing *Big Country Radio, Inc.*, 50 FCC 2d 967, 968 (Rev. Bd. 1975). The following discussion addresses each of the six issues designated in the

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<sup>37</sup> Exhibit C at ¶ 5.

<sup>38</sup> HDO, ¶ 2.

<sup>39</sup> Exhibit C at ¶ 2.

<sup>40</sup> Exhibit B at ¶¶ 1-3; Exhibit C at ¶ 2.

<sup>41</sup> Exhibit C at ¶ 3.

<sup>42</sup> Exhibit C at ¶ 3.

<sup>43</sup> Exhibit C at ¶¶ 1-2.

Commission's *HDO*, demonstrates that there is no disagreement between the parties regarding the basic facts and material factual inferences set forth herein, and demonstrates that summary decision is appropriate.

(a) *To determine whether Norcom, East End, LMR 900, ... and/or ... [NY LMR] violated Section 310(d) of the Act by engaging in unauthorized transfers of control of Stations WPAT918, WNXT323, WPAZ643, WPAP734, and/or WPAT910.*

Section 310(d) of the Communications Act of 1934, 47 U.S.C. § 310(d), prohibits the transfer of control of a radio station without the Commission's prior approval. This section of the Communications Act has been interpreted to forbid either *de jure* or *de facto* transfer of control without prior approval by the FCC.<sup>44</sup> The *HDO* stated that an unauthorized transfer of *de facto* control resulted from the Associations' and Norcom's violation of the six-factor test set out in *Intermountain Microwave*, 24 RR 983 (1963).<sup>45</sup>

The Movants agree that, as alleged in the *HDO*, the *Intermountain Microwave* criteria were not observed. Accordingly, there is no disagreement between the parties regarding whether, pursuant to that test as applied in this case, Norcom assumed unauthorized *de facto* control of the stations licensed to the Associations without prior Commission consent, in violation of §310(d) of the Act.<sup>46</sup> Norcom assumed more control over the operations of the Associations' stations than permitted under the *Intermountain Microwave* standard. Thus, the Movants believe that the facts set forth above, about which there is no disagreement, support the legal conclusion that Norcom and the Associations violated Section 310(d) of the Act, based on the *Intermountain Microwave* standard, by engaging in unauthorized transfers of control of Stations WPAT918, WNXT323, WPAZ643, WPAP734, and/or WPAT910. Accordingly, Movants request summary decision adverse to Norcom and to the Associations on this issue.

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<sup>44</sup> *Lorrain Journal Co. v. FCC*, 351 F.2d 824, 828 (D.C. Cir. 1965), cert. denied, 383 U.S. 967, 86 S.Ct 1272 (1966).

<sup>45</sup> *HDO*, ¶ 9. Norcom moved the Presiding Judge to delete the issue of unauthorized transfer of control based on the FCC's use of the *Intermountain Microwave* criteria. See Norcom's Motion to Delete And/Or Change Issues, filed December 9, 1998, attached hereto as Exhibit G. The Presiding Judge denied that motion, and subsequently denied Norcom's Motion for Permission to Appeal. See *Memorandum Opinion and Order*, FCC 99M-4, released January 15, 1999.

<sup>46</sup> Communications Act of 1934, as amended, 47 USC 151, et seq.



*(b) To determine whether Norcom, East End, LMR 900, ... and/or ... [NY LMR] violated Section 90.179(f) of the Commission's Rules, 47 C.F.R. § 90.179(f), by operating Stations WPAT918, WNXT323, WPAZ643, WPAP734, and/or WPAT910 on a for-profit basis.*

Applying the *Intermountain Microwave* criteria in this case, Norcom essentially “stands in the shoes” of the Association licensees whose two-way radio stations it manages. Because Norcom is not authorized to provide service on a not-for-profit basis,<sup>47</sup> and because, under the *Intermountain Microwave* criteria, Norcom assumed control of the Associations’ stations, Norcom and the Associations violated Section 90.179(f) of the Commission's Rules, 47 C.F.R. § 90.179(f), by operating Stations WPAT918, WNXT323, WPAZ643, WPAP734, and WPAT910 on a for-profit basis. There is no disagreement regarding the above facts. Accordingly, Movants request summary decision adverse to Norcom and the Associations on this issue.

*(c) To determine whether Norcom has abused the Commission's processes in connection with the creation and/or control of the Associations and/or with the control and/or operation of the Associations' stations.*

Since the time the HDO was issued, new facts and evidence have been developed which cast significant doubt upon the FCC’s assertion regarding this issue and support the conclusion that Norcom did not abuse the FCC’s processes:

(1) Norcom and the Associations relied on the advice of counsel during the formation of the Associations, the course of the Associations applying for FB7 authorizations, and the preparation of management agreements pursuant to which Norcom would manage the Associations’ stations.<sup>48</sup> The Movants were advised by counsel that FCC regulations allowed the licensing of FB7 stations to non-profit associations organized for the purpose of providing wireless communications service to eligible entities on a non-profit basis, and, until the release of the HDO, the Movants believed themselves to be in compliance with all applicable FCC regulations.<sup>49</sup> In particular, the previous and current controlling principals of Norcom believed that the management agreements between Norcom and the Associations complied with the FCC’s legal standards.<sup>50</sup> At

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<sup>47</sup> HDO, ¶ 3.

<sup>48</sup> Exhibit A at ¶ 3; Exhibit B at ¶ 5.

<sup>49</sup> Exhibit A at ¶¶ 3-4; Exhibit B at ¶¶ 5-6.

<sup>50</sup> Exhibit B at ¶¶ 5-6; Exhibit C at ¶ 6.

the time it issued the HDO, the FCC, and the WTB in particular, was not aware of the extent to which the Movants relied on the advice of counsel and their good faith interpretation of FCC control standards for private land mobile radio stations.<sup>51</sup>

While it is true that reliance on the advice of counsel is not a complete defense to all FCC rule violations, the agency has recognized that reliance on the advice of counsel may constitute a mitigating factor when violations relating to a regulatee's character are adjudicated. For example, in *Fox Television Stations, Inc.*, the Commission found that Fox's good faith reliance on the advice of counsel involving "a complex area of the law" was an excuse to Fox's alien ownership violations.<sup>52</sup> In this case, Norcom and the Associations were advised by counsel, and believed, that the formation of the Associations and the management agreements pursuant to which Norcom would manage the Associations' stations complied with all applicable FCC regulations.<sup>53</sup> Therefore, Norcom's reliance on advice of counsel is a particularly appropriate mitigating factor in this case.

(2) The Movants never attempted to conceal the existence of a relationship between Norcom and the Associations.<sup>54</sup> On the contrary, throughout the application process and negotiation of the 1992 Settlement Agreement, the Associations, in part based upon an inquiry from the agency's staff, disclosed to the FCC that Norcom would manage the stations for the Associations.<sup>55</sup> Unfortunately, as the Movants learned in the initial discovery phase of this proceeding, the WTB lost documents in a June 1996 flood that pre-dated the WTB's investigation of Norcom and the Associations.<sup>56</sup> Thus, certain evidence of the Commission's prior knowledge of Norcom's role in the Associations' stations appears to have been literally washed away.<sup>57</sup>

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<sup>51</sup> Exhibit A at ¶¶ 3-4; Exhibit B at ¶¶ 5-6.

<sup>52</sup> *Fox Television Stations, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 8452 at para 119 (1995) ("*Fox*"). See also *Abacus Broadcasting Corp.*, 8 FCC Rcd 5110, para 12 (Rev. Bd. 1993) ("[T]he Commission has been... reluctant to impute a disqualifying lack of candor to an applicant where the record shows good faith reliance on counsel") (citations omitted).

<sup>53</sup> Exhibit A at ¶¶ 3-4, 8 ; Exhibit B at ¶¶ 5-6.

<sup>54</sup> Exhibit A at ¶¶ 6-7; Exhibit B at ¶ 7.

<sup>55</sup> Exhibit A at ¶¶ 7-8; Exhibit B to Norcom's Motion to Delete And/Or Change Issues, filed December 9, 1998, attached hereto as Exhibit G.

<sup>56</sup> Exhibits D and E.

<sup>57</sup> See e.g., Exhibit A at ¶¶ 4-6; Exhibit C at ¶ 4; Exhibit D at Nos. 8, 12-13; Exhibit E at Nos. 8, 12-13.

Accordingly, during its consideration of this matter, the Commission and the FCC's investigative staff may not have been able to view documents that may have contained exculpatory information.

(3) Contrary to the allegation in the *HDO*, Norcom was eligible to obtain channels in the 800 MHz band designated for entities operating facilities on a not-for-profit basis at the time the Associations were formed and to use those channels in connection with its SMR facilities. At that time, pursuant to the agency's "inter-category sharing" policy, the rules permitted SMR licensees to apply for additional channels, within 40 miles of their existing transmitter sites, in the so-called "Business" and "Industrial/Land Transportation" frequency pools, where channels were available for entities offering service on a not-for-profit, cost shared basis, provided that the SMR licensees had already loaded their existing systems to at least 70 mobiles per channel.<sup>58</sup> While Norcom could not have secured authorizations for the same number of channels at the same sites as the associations ultimately obtained licenses, based on its then-existing loading level, Norcom was eligible to secure Business or Industrial/Land Transportation pool channels, as the FCC's policies permitted.<sup>59</sup> This evidence casts doubt on the FCC's assertion that Norcom formed the Associations because it *had no other means* by which to obtain additional spectrum for commercial services.

At the time it adopted the *HDO*, the FCC's "inter-category sharing" policy had been terminated for several years,<sup>60</sup> and the agency did not possess information concerning Norcom's level of mobile loading in the 1991-1992 time frame. Thus, the FCC was unable to consider whether the availability of "inter-category sharing" affected its assertions in the case.

(4) Moreover, Norcom's participation in the formation of the associations and the preparation of the associations' applications was not unlawful nor unusual. Nor was Norcom's subsequent engagement as the manager unlawful. As noted in the Petrutsas Declaration, third party management arrangements of radio facilities were common in the land mobile radio industry and were sanctioned by the Commission.<sup>61</sup>

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<sup>58</sup> 47 C.F.R. § 90.621(g) (1991), attached hereto as Exhibit H.

<sup>59</sup> See Letter from Russell Fox to Judy Lancaster, dated January 22, 1999, attached hereto as Exhibit I.

<sup>60</sup> See *First Report and Order*, PR Docket No. 93-144, 11 FCC Rcd 1463, ¶ 138, released December 15, 1995.

<sup>61</sup> Exhibit A at ¶ 2.

The Movants assert that Norcom did not abuse the Commission's processes. Abuse of process is "not an easy matter to prove," *WWOR TV, Inc.*, 7 FCC Rcd 636, ¶ 24 (1992), and must be based on "more than a generalized concern." A conclusion that an entity abused the FCC's process requires a "specific finding, supported by the record, of abusive intent." *Evansville Skywave, Inc.*, 7 FCC Rcd 1699, 1702 n.10 (1992) (emphasis added). With regard to required disclosures in the application process, only intentional non-disclosures will support a finding of abuse of process. *Eunice Wilder*, 4 FCC Rcd 5310, ¶ 251 (1989).

Based on the foregoing, the Movants assert that the above facts, about which there is no material disagreement, support the conclusion that Norcom did not abuse the Commission's processes in connection with the creation and/or control of the Associations and/or with the control and/or operation of the associations stations. Accordingly, the Movants request summary decision in Norcom's favor on this issue.

*(d) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Norcom, East End, LMR 900, ... and/or ... [NY LMR] are basically qualified to be Commission licensees.*

The Movants concede that they violated Section 310(b) of the Communications Act, based on the *Intermountain Microwave* transfer of control criteria cited in the HDO, and that, based on that violation, they also violated §90.179(f) of the Rules. However, an unauthorized transfer of control, standing alone, is not a sufficiently egregious violation, under FCC precedent, to implicate disqualification of the entities involved. In general, unauthorized transfers of control lead the Commission to consider license revocation only when the violation is concealed through misrepresentation or other deception. *IDB Communications Group*, 10 FCC Rcd 1110, n.42 (1994). The agency has held that, when parties make their actions known to the Commission and "no culpable non-disclosure or concealment in this regard appears on the record," then "the severe sanction of revocation of license is not warranted." *Blue Ribbon Broadcasting, Inc.*, 90 FCC 2d 1023 ¶ 9 (1982).

As noted above, the Movants believe that the above facts support a finding that Norcom did not attempt to conceal its role in the formation of the Associations or the management of the Associations' stations. Moreover, until the release of the HDO, Movants believed that the arrangements for managing the Associations' stations complied with what they believed were the

applicable standards.<sup>62</sup> Therefore, because FCC precedent requires that revocation is only appropriate in the most severe of violations, revocation of Norcom's licenses is not appropriate.

The same conclusion should be drawn for the Movants' violation of FCC rule section 90.179. As indicated above, that violation occurred because the Movants unlawfully assumed control of the associations' stations, as the criteria for transfer of control is established in the HDO. Thus, if the Presiding Judge concludes that the Movants commission of an unauthorized transfer of control is not disqualifying, he should reach a similar conclusion with respect to the violation of rule section 90.179(f).

Further, Douglas Nopper, the current controlling principal of Norcom, was an out-of-town college student during the time that the Associations were formed and obtained licenses.<sup>63</sup> He had no part in, nor control over, the actions of the then-controlling principal, Robert Nopper.<sup>64</sup> Since the most important qualification for a licensee is good character to ensure honest dealings in the future,<sup>65</sup> the Presiding Judge should not find the current principal of Norcom unqualified because of the former principal's violations. Similarly, the Presiding Judge should not punish Norcom with the severe sanction of license revocation based on the limited circumstances that have given rise to this case. *See KQED, Inc.*, 3 FCC Rcd 2821, ¶ 37 (1988) (FCC has reserved "the ultimate sanction of removal of all licensee rights . . . for cases of egregious misconduct evincing a pervasive unwillingness or inability to meet the basic responsibilities of a licensee"). While Norcom acknowledges its lack of compliance with the FCC's policies in this matter, its actions are isolated in nature.

Accordingly, the Movants assert that the above facts, about which there is no material disagreement, support the conclusion that Norcom remains qualified to be a Commission licensee. Pursuant to the Agreement, the Associations have agreed to surrender their licenses for cancellation. As a result, the issue of whether the Associations are qualified to be Commission licensees is moot if

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<sup>62</sup> Exhibit A at ¶¶ 4, 8; Exhibit B at ¶ 6; Exhibit C at ¶ 6.

<sup>63</sup> Exhibit C at ¶ 3.

<sup>64</sup> Exhibit C at ¶ 3.

<sup>65</sup> *See KPFW Broadcasting Company*, 47 FCC 2d 1090, 1095-96 (1974) (granting renewal and new construction permit in light of "unlikelihood that the misconduct involving [a different station] will be repeated").

the Presiding Judge grants the Joint Request for Approval and Adoption of the Settlement Agreement. Accordingly, Movants request summary decision in their favor on this issue.

*(e) To determine, in light of the evidence adduced pursuant to issues (a)-(d), whether the above-captioned licenses should be revoked.*

If the Presiding Judge finds in favor of the Movants on Issue (d) above and concludes that Norcom remains qualified as an FCC licensee, then there is no further basis upon which to revoke Norcom's licenses captioned in the HDO. Moreover, as noted above, pursuant to the Agreement, the Associations have agreed to surrender their authorizations for cancellation. Accordingly, the Presiding Judge need not address whether the Associations' licenses should be revoked if he grants the Joint Request for Approval and Adoption of the Settlement Agreement. Accordingly, Movants request summary decision in their favor on this issue.

*(f) To determine, in light of the evidence adduced pursuant to issues (a)-(d), whether the above-captioned applications should be granted.*<sup>66</sup>

In this case, the captioned applications are not applications for new radio station facilities, but are instead merely applications for modification of existing two-way radio station facilities that are unrelated to the facilities operated by the Associations.<sup>67</sup> Thus, the Movants request that the Presiding Judge dismiss the applications *without prejudice to their resubmission* after this hearing proceeding is completed. Because Norcom would remain qualified to hold FCC licenses, it is presumed that Norcom should have the ability to request modification of those licenses, consistent with the agency's normal application processing rules. Accordingly, there is no genuine issue of material fact relating to the pending applications and Movants request dismissal of the applications without prejudice, by the Presiding Judge.<sup>68</sup>

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<sup>66</sup> These applications are for modification of Norcom's stations WNQF836, WZA770, and WNBW505.

<sup>67</sup> Exhibit C at ¶ 7.

<sup>68</sup> See 47 C.F.R. § 1.934(a)(3) (1999) (permitting hearing officer to dismiss application without prejudice upon a showing of good cause).

### Summary

Based on the foregoing, the Movants respectfully request that the Presiding Judge grant summary decision of the issues designated in the HDO, in a manner consistent with the Agreement, by:

Issue (a) - Finding that the Movants violated Section 310(d) of the Act by engaging in unauthorized transfers of control of Stations WPAT918, WNXT323, WPAZ643, WPAP734, and WPAT910;

Issue (b) - Finding that the Movants violated Section 90.179(f) of the Commission's rules by operating Stations WPAT918, WNXT323, WPAZ643, WPAP734, and WPAT910 on a for-profit basis;

Issue (c) - Finding that Norcom did not abuse the Commission's processes in connection with the creation or control of the Associations or with the control or operation of the Associations' stations;

Issue (d) - Finding that Norcom is basically qualified to be a Commission licensee and that the issue is moot as to the Associations;<sup>69</sup>

Issue (e) - Finding that the HDO-captioned licenses of Norcom should not be revoked and that the issue is moot as to the HDO-captioned licenses of the Associations;<sup>70</sup> and

Issue (f) - Dismissing without prejudice the HDO-captioned applications associated with Norcom stations WNQF836, WZA770, and WNBW505.

In addition to the foregoing, and consistent with the Agreement, the Movants respectfully request that the Presiding Judge take the following action in light of the findings specified above:

- (1) Order Norcom to pay a \$110,000 monetary forfeiture;
- (2) Order East End, LMR 900, and NY LMR to each pay a \$3,000 monetary forfeiture;
- (3) Order Norcom to institute a compliance program; and
- (4) Order the WTB to process Norcom's pending applications.


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<sup>69</sup> Based upon the Presiding Judge's grant of the Joint Request for Approval and Adoption of the Settlement Agreement.

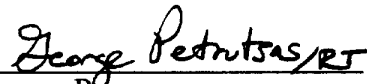
<sup>70</sup> Based upon the Presiding Judge's grant of the Joint Request for Approval and Adoption of the Settlement Agreement.

Respectfully submitted,

NORCOM COMMUNICATIONS CORPORATION

By:   
Russell H. Fox  
Russ Taylor  
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(202) 408-7100

ASS'N FOR EAST END LAND MOBILE COVERAGE  
LMR 900 ASSOCIATION OF SUFFOLK  
NY LMR ASSOCIATION

By:   
George Petrutsas  
Ann Bavender  
Fletcher Heald & Hildreth, PLC  
1300 North 17th Street, 11th Floor  
Arlington, VA 22209-3801  
(703) 812-0400

Dated: July 22, 1999

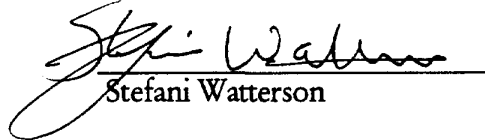


CERTIFICATE OF SERVICE

I, Stefani Watterson, a secretary in the law firm of Gardner, Carton & Douglas, certify that I have this 22d day of July, 1999, caused to be sent by hand delivery, a copy of the foregoing Joint Motion For Summary Decision to the following:

Honorable John M. Frysiak  
Administrative Law Judge  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., Room 1C861  
Washington, D.C. 20554

Judy Lancaster, Esq.  
Federal Communications Commission  
Wireless Telecommunications Bureau  
Enforcement Division  
445 12<sup>th</sup> Street, S.W., Room 3C438  
Washington, D.C. 20554  
*Counsel for Wireless Telecommunications Bureau*

  
Stefani Watterson

DC01/309502.1  
07/22/99 11:46 AM

A

## **DECLARATION OF GEORGE PETRUTSAS**

My name is George Petrutsas. I am a lawyer by profession and have been in private practice, specializing in wireless telecommunications law, since 1980. Prior thereto, for a period of approximately twenty years, I was employed by the Federal Communications Commission (FCC) in various legal and managerial capacities.

I am making this Declaration for the purpose of facilitating a resolution of the issues in WTB Docket No. 98-181. Therefore, the statements made herein may be used solely for that purpose, and no other.

For some time prior to 1991, I provided legal assistance to Norcom Communications Corporation ("Norcom"). Sometime in 1991, or shortly prior to 1991, Mr. Robert Nopper, a principal of Norcom, asked me on his behalf and on behalf of several other individuals for advice on how to establish multi-channel trunked wireless communication systems on frequencies allocated in the Business and/or the Industrial/Land Transportation Pools in the 800 and 900 MHz bands. After reviewing the relevant rules and regulations of the FCC, I informed them that such systems could be licensed to non-profit associations organized for the purpose of providing wireless communications service to eligible entities on a non-profit basis, and recommended that course of action. The FCC's rules provide for the licensing of such non-profit associations. I had previously assisted another non-profit association in applying for and securing a similar license from the FCC. Mr. Nopper and the others involved accepted my recommendations.

As a result, several non-profit associations were formed. Since the FCC's rules do not prescribe any requirements for the organization, structure, and governance of such entities, on my recommendation, a very simple organizational structure was adopted. See, for example, Attachment 5. For the management of the planned facilities, it was decided to employ an entity experienced in the operation of wireless communications facilities under a management agreement. Norcom, an experienced operator of land mobile wireless facilities, was employed by each of the associations involved as its manager. Such arrangements were common at the time for the management of SMR and private radio systems and had been sanctioned by the FCC. Each association entered into a management agreement with Norcom. I supplied most of the text of those management agreements. See, for example, Attachment 16. The management agreements that were entered into were consistent with the management agreements used in the SMR and private radio industry at that time.

Applications for licenses were filed by seven associations in 1991. The applications filed by Central Suffolk Associations of Land Mobile Users and by the Land Mobile Association of Long Island were later withdrawn to resolve staff concerns regarding the number of frequencies requested by the associations. The nature of the

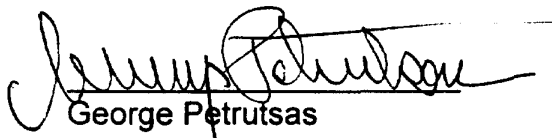
Commission in the applications and in the ensuing amendments to the applications and in the responses to Commission inquiries regarding the applications. See, for example, Attachments 4, 7 and 8.

I represented each of the associations and helped them prepare their applications, including securing coordination for the frequencies requested, and I filed the applications on their behalf. As counsel, I discussed the applications with the Commission's staff by telephone and in several letters. See, for example, Attachments 3, 9, and 11. After the nature of the applicants, the proposed plan of operation, and the system management role of Norcom Communications were described to the Commission in response to staff inquiries, see Attachments 2, 3, 4, 7, and 8, the staff raised no further issues with respect thereto. The staff's concerns and subsequent correspondence and telephone discussions with the staff had to do with the number of frequencies each association had requested. See Attachment 10. That issue was discussed extensively and it was resolved by an agreement under which two applications were withdrawn and the remaining applicants were required to load the frequencies in a period shorter than that prescribed by the Commission's Rules. See, Attachments 12, 13 and 14.

Most of the telephone discussions were with Mr. Peter Daronco, an attorney in the then Private Radio Bureau. During those discussions, Mr. Daronco indicated to me that he kept his colleagues and superiors informed of the discussions. As a result of those discussions and related correspondence, agreement on the number of frequencies to be granted was reached. That agreement is summarized in my letter to Mr. Terry L. Fishel, Chief, Land Mobile Branch, dated September 24, 1992, a copy of which is attached as Attachment 12. Shortly thereafter, by letter dated October 28, 1992, Mr. Fishel outlined the agreed conditions under which four of the applications would be granted. See Attachment 15. The fifth application was granted some time later under approximately the same terms.

Until the Commission released its designation order in this proceeding, I believed that the standards the then Private Radio Bureau had set out in its Motorola decision in 1988 governed third party management of the radio systems licensed to the associations, and that the existing arrangements between each of the associations and Norcom met those standards. Consequently, I did not suggest any changes to the management arrangements between the associations and Norcom.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my recollection and belief. I further declare under penalty of perjury that the documents attached hereto as Attachments 1 through 16 are true and correct copies of documents I sent or received.

  
George Petrutsas

June 21, 1999

Attachment 1

Application of the Association for East End  
Land Mobile Coverage, File No. 532866,  
filed with FCC on February 20, 1991, and  
Attachment A to that Application

FCC 574

August 1991

See reverse side for information regarding public burden estimate.

Approved by OMB

3060-0128

Expires 5/31/92

## APPLICATION FOR PRIVATE

IMPORTANT NOTICE: ALL applicants MUST include the following information on their applications: those applications at the PROPER LOCATION. Refer to the current fee publication or contact the Consumer Assistance Branch, Federal Communications Commission, Gettysburg, PA 17326 (717) 337-1212.

## MOBILE RADIO SERVICES 350

COMMISSION ONLY:

Page No.  
of

532866

1.	Frequencies (MHz)	2. Station Class	3. No. of Units	4. Emission Designator	5. Output Power	6. E.R.P.	7. A.A.T.	8. Ground Elevation	9. Ant. Hgt. To Tip	10. Antenna Latitude	11. Antenna Longitude	12. Number of Mobiles By Category.
A	856.9125	FB2	1	20F3	75	190	302	291	45	40-58-26	72-20-15	Vehicular <u>500</u>
A	857.9125	FB2	1	20F3	75	190	302	291	45	40-58-26	72-20-15	Portable _____
A	858.8125	FB2	1	20F3	75	190	302	291	45	40-58-26	72-20-15	Aircraft _____
A	859.8625	FB2	1	20F3	75	190	302	291	45	40-58-26	72-20-15	Marine _____
A	860.7875	FB2	1	20F3	75	190	302	291	45	40-58-26	72-20-15	Pagers _____
G	811.9125	FX1	29	20F3	30	82						13. Area of Operation for Mobiles, Temporary, or Itinerant Stations
G	812.9125	FX1	29	20F3	30	82						is <u>30</u> miles
G	813.8125	FX1	29	20F3	30	82						radius of station A.
G	814.8625	FX1	29	20F3	30	82						or is _____ miles
G	815.7875	FX1	29	20F3	30	82						radius of coordinates
H	811.9125	MO	<u>500</u>	20F3	30	45						Lat _____
H	812.9125	MO	<u>500</u>	20F3	30	45						Long _____
H	813.8125	MO	<u>500</u>	20F3	30	45						County _____
H	814.8625	MO	<u>500</u>	20F3	30	45						State _____
H	815.7875	MO	<u>500</u>	20F3	30	45						If not, please check ONE.

14. Station Address or Geographic Location	15. City	16. County	17. St.
A Ferrara Tower	Sag Harbor	Suffolk	NY
B			
C			
D			
E			
F			

18. Location of Primary Control Point (Include telephone number) and location of all Radio Control Stations with antenna under 20 ft. (See instructions.)	19. Freq. Advisory Comm. No.	20. Radio Service
70-C Corbin Avenue No #22 Bay Shore, New York 11706 11-16-92 516-595-2555 11-16-95 144 S/C Grants pursuant to agreement All control stations (FX1) will meet at 10-24-92. and comply with the 20 ft. rule. <i>Princess must meet a loading requirement of 70 mobiles per channel at the end of 3 years.</i>	910420162	YB
21. Applicant/Licensee Name (See instructions): The Association for East End Land Mobile Coverage		
22. Mailing Address (Number & Street, P.O. Box or Rt. No.): ATTN: Timothy J. Mangan ADDRESS: 70-C Corbin Ave.		
23. City Bay Shore	24. State NY	25. ZIP Code 11706

26. Will antenna be mounted on a structure with an existing antenna? If yes, give call sign and radio service of existing licensee.	27. Provide description of the structure on which your antenna is mounted and the height above ground to the top of the structure. (See antenna figures 1-3 on reverse for samples.)	28. Give the name of the nearest aircraft landing area, and the distance and direction to the nearest runway.
No Yes Call Sign Radio Service	Structure Type Structure Height Above Ground	Aircraft Landing Area Name Distance (Miles) Direction
A <input checked="" type="checkbox"/> WNNP502 YX	A Tower 45	
B	B	
C	C	
D	D	
E	E	
F	F	

29. Has notice of construction or alteration been filed with the FAA? If yes, give the date filed, the name under which filed, and the FAA office where filed.	30. Applicant Classification	31. Eligibility (Describe Activity):
No Yes Date Filed Name Under Which Filed FAA Office Where Filed	<input checked="" type="checkbox"/> Association <input type="checkbox"/> Corporation <input type="checkbox"/> Individual <input type="checkbox"/> Partnership <input type="checkbox"/> Govt. Entity	Applicant is a non-profit association proposing to provide radio service to eligible entities in the business radio service on a non-profit basis.
A		See ATTACHMENT A
B		
C		
D		
E		
F		
32. Application is for (check one): <input type="checkbox"/> Modification <input type="checkbox"/> Assignment <input checked="" type="checkbox"/> New Station <input type="checkbox"/> Reinstatement <input type="checkbox"/> Renewal	33. Does application include the complete system? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	34. Supplemental Information for Trunked and Conventional Systems 806-824/851-869 MHz and 896-901/935-940 MHz frequency bands Indicate Type of Applicant: <input checked="" type="checkbox"/> a) Independent <input type="checkbox"/> b) Commercial (SMRS environment)

35. Application or license modified, if applicable:

36. If other than new station, list call sign(s) of existing station(s) to be modified, combined or reinstated.

37. Individual completing this application form(s):

George Petrutsus  
Telephone No. ( 202 ) 828-5700

FOR COORDINATOR USE ONLY:

~~RECEIVED~~  
2-18-91  
CCW

NABER  
CERTIFIED  
6-4-91  
DMD

☐ c) Community Repeater (Owner)

d) SMRS user (Show SMRS license name and call sign and allocate vol. to loading)

Type of system: (Check One)

☐ a) Conventional. Specify the number of mobile units to be placed in operation at the time of grant:

☒ b) Trunked. Specify the number of trunked channels requested: 5 channels

Frequency Band Requested: (Check One) ☒ a) 851-869 MHz ☐ b) 935-940 MHz

CERTIFICATION, READ CAREFULLY BEFORE SIGNING

- 1) Applicant certifies that a current copy of the requested radio service rules will be obtained. Contact Washington, DC 20402 (202) 783-3238.
- 2) Applicant will have no other use of the particular frequency regardless of prior use by license or otherwise.
- 3) Applicant will have no other use of the equipment and will control access to exclude unauthorized persons.
- 4) Neither applicant nor any member thereof is a foreign government or representative thereof.
- 5) Applicant certifies that all statements made in this application and attachments are true, complete, correct and made in good faith.
- 6) Applicant certifies that the signature is that of the individual, or partner, or officer or duly authorized employee of a corporation, or officer who is a member of an unincorporated association, or appropriate elected or appointed official on behalf of a governmental entity.

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT. U.S. CODE TITLE 18, SECTION 1001

Typed/Printed Name:

TIMOTHY J. MANGAN

Telephone No.

(516) 595-2555

Signature: MUST BE ORIGINAL

Date:

2-4-91

### ATTACHMENT

The applicant claims eligibility for a trunked system under Sections 90.61(b) and 90.603(b) of the Commission's Rules. Attached is a list of entities who have already requested radio service. The applicant certifies, pursuant to Section 90.631(b), that a minimum of 70 mobiles and controls per channel (at least 280 units) will be placed in operation within five (5) years of the grant.



ATTACHMENT A

List of prospective shared users  
of the trunk system proposed by  
The Association for East End Land Mobile Coverage

Colonial Mechanical 278 Indian Head Road Kings Park, NY 11754 Attn: Ken Mullen (516) 544-4500	14 Mobiles
Long Island Oil Inc. P.O. Box 147 Massapequa Park, NY Attn: Frank Sheridan (516) <del>799-3111</del>	10 mobiles
Sun Set Sanitation 82 Modular Avenue Commack, NY 11725 Attn: Frank Palopoli (516) 543-1890	9 mobiles
Set To Fit 65 Howard Avenue Stamford CT 06902 Attn: Bill Mackesy (203) 325-8800	11 mobiles
Asphalt Pavers Inc. 500 Patton Avenue West Babylon, NY 11704 Attn: Herb Payne (516) 420-1040	14 Mobiles
AFCO Precast Corp. 250 Orchard Road E. Patchogue, NY 11772 Attn: Richard Affenita (516) 654-3370	11 mobiles
Adam Russell Cable Service 116 North Main Street Port Chester, NY 10573 Attn: Jeff cordoso (914) 937-8689	11 mobiles
All American Pools 8-10 Van Tassel Court Norwalk, CT 06851 Attn: John Romano (203) 847-2704	13 mobiles
Maniac Leasing Corp. 191 Cabot Street W. Babylon, NY 11704 Attn: John White	19 mobiles
Airborne Freight Corp. 1915 Stradford Ave. Standford, CT 06497 Attn: Martin Longley (206) 281-4828	42 mobiles